

## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Wednesday, February 17, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Sarah Richarz

Address: 724 N. Sanborn St.

City: Canton

State: SD

Zip: 57013

Email: [sarah.richarz@k12.sd.us](mailto:sarah.richarz@k12.sd.us)

Phone: 605-764-2579

Comment: I appreciate the time and effort spent on the proposed regulations. I understand the need to implement the rules. I am concerned that education professionals may misinterpret the terms within the rules if they are not clearly defined. Example: dangerous behavior- "serious, probable, imminent threat of bodily injury or harm". I believe the intention of the law is to apply this to situations which will likely result in disfigurement or death. I am not sure all will understand the severity that may prompt a response of seclusion or restraint.



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Thursday, February 18, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Terry Gerber

Address: 800 N. Main

City: Canton

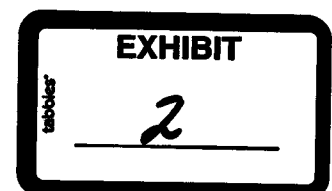
State: SD

Zip: 57013

Email: [terry.gerber@k12.sd.us](mailto:terry.gerber@k12.sd.us)

Phone:

Comment: I understand that the Federal Department of Education is requiring South Dakota to have these regulations in place. I would encourage the Board of Education to not simply adopt the federal recommended language, and instead, make it relevant to South Dakota. Ensure that the terms are clearly defined and there is no ambiguity in what educators are and aren't required to do. Please don't be more restrictive than state law requires. Thank you!



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Monday, February 22, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Tracey Olson

Address: Colman-Egan School

City: Colman

State: SD

Zip: 57017

Email: [tracey.olson@k12.sd.us](mailto:tracey.olson@k12.sd.us)

Phone: 605-534-3534

Comment: Re: I believe there is more work to be done to protect students and staff with this particular piece of administrative rule promulgation. I know it is needed but the current version still needs to be more comprehensive in recognizing the realities of what schools are faced with every day. We know children need our help every day to be safe and staff being properly trained is the first step in ensuring that can happen. Establishing rules that prevent the use of proper holds is not going to assist schools or students in being more safe. We need the rules to acknowledge students can be held safely on the ground and it must be part of the rules package.



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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Monday, February 22, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Chrissy Peterson

Address: 1230 Douglas St

City: Sturgis

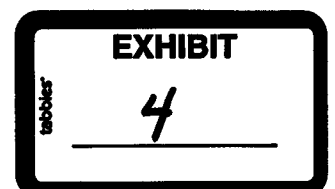
State: SD

Zip: 57785

Email: [Chrissy.Peterson@k12.sd.us](mailto:Chrissy.Peterson@k12.sd.us)

Phone: 605-347-4770 Ext. 4

Comment: I had a question about our draft policy that I could not answer. It was: A fight starts on the bus with two bigger students. The bus driver has to restrain one of them due to the severity of the violence. The same evening, two kids get into a fight in the locker room and the coach had to restrain one. Neither the bus driver or the coach are core team members. What happens? Our draft says "the core team of selected school employees shall be designated to respond to dangerous behavior and to implement emergency safety intervention of students"



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Thursday, February 25, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Marie Ivers

Address: 600 West Community Drive

City: Flandreau

State: SD

Zip: 57028

Email: [Marie.Ivers@k12.sd.us](mailto:Marie.Ivers@k12.sd.us)

Phone: 864-1674

Comment: School Districts Flandreau Public 50-3, Colman-Egan 50-5, Rutland 39-4, and Oldham-Ramona 39-5 are opposed to the proposed DOE administrative rule 24:44 EMERGENCY SAFETY INTERVENTION for the following reasons: \*\*\* We do not feel that the proposed Emergency Safety Intervention policy realistically provides for adequate safety for both students and staff as it is currently written. Specifically, we are concerned with prohibiting prone and supine restraints as stated in 24:44:02:05. Not only are prone and supine restraints legal and utilized as part of accredited behavioral management programs (Safe Crisis Management, Crisis Prevention Intervention, Boys Town Model – BEP, Handle With Care – HWC, MANDT), in certain situations these types of restraints are safer, more effective and decrease the chance of students and staff being harmed. AND \*\*\* The proposed implementation deadline of July 1, 2016 does not provide adequate time for SD school districts to follow all procedures stated in 24:44:04:01, nor does it provide adequate resource-options for training or offer a financial solution or plan for/of implementation. If passed, a district must first develop a district policy following SDAR policy guidelines, then research and purchase an appropriate behavior management program they will adopt, send staff member(s) to a multiple-day train-the-trainer class at approximate cost of \$3500-\$5000 plus traveling expenses per person, arrange for time and additional stipends for the trainer to train all staff, and make sure this is done and in place by July 1st, when public school isn't in session. Superintendent Rick Weber, Flandreau Public School District 50-3 Superintendent Tracey Olson, Colman-Egan School District 50-5 Superintendent Peter Books, Rutland School District 39-4 Superintendent Tom Ludens, Oldham-Ramona School District 39-5 Submitted by Marie Ivers, Director of Special Education With direction and approval from each above Superintendent



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Monday, February 29, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: David Pappone

Address: 2000 River Bluff Dr

City: Brandon

State: SD

Zip: 57005

Email: [david.pappone@k12.sd.us](mailto:david.pappone@k12.sd.us)

Phone:

Comment: I do not believe the implications of these proposed rules are understood by those in K-12 education. My suggestion is to table the rules and provide extensive discussion with practitioners in the field so they become qualified to provide meaningful input into the substance of the rules. A summer study and a complete explanation prior to adoption would be appreciated.



**HANDLE WITH CARE**  
*Behavior Management System, Inc.*

FEB 29 2016

**Bruce Chapman**  
President

**Hilary Adler**  
Vice President

**TO ALL SOUTH DAKOTA BOARD OF EDUCATION MEMBERS**

**HWC'S COMMENTS TO DRAFT EMERGENCY SAFETY INTERVENTION  
RULES – COMMENTS DUE MARCH 11, 2016**

**Re: DOE Rule 24.44**

Proposed Rule 24.44 regarding the use of restraint in schools conflicts with South Dakota's Constitution and Laws (case law and statute). The role of an administrative agency is to ensure the law as enacted by the legislature and interpreted by the courts is followed. It is not within the scope of authority for an administrative agency, comprised of unelected administrators, to enact law. It is also not within the scope of authority for an administrative agency to enact a rules that directly conflict with Constitutional or State law.

There are Supreme Court (SCOTUS) rulings holding that the right to self-defense does not stop at the schoolhouse gates. This proposed rule limits a person's right to protect self, others and property to an amount less than the Constitution and law provides as a matter of right. Every South Dakota citizen has a Constitutional right to come to the defense of self, others and property. The Rule as it is written regarding the use of restraint is unlawful. The rule should be withdrawn and re-written in accordance with South Dakota law.

Below are our comments as well as citations to Federal and South Dakota laws that this rule conflicts with.

**HWC's expert and legal analysis of Draft Rule 24.44**

**The blanket prohibition of all floor holds required by SD-DOE Draft Rule 24.44 is as dangerous as it is illegal**

A teacher cannot be forced to surrender her lawful right to self-defense (or defense of others) when she walks onto school grounds. South Dakota's citizens can only be legally required to use "reasonable" force in accordance with a "reasonable person standard". A teacher does not need the approval of an unelected bureaucrat or even her principal, for that matter, to use physical restraint to protect herself or another. She may lawfully use the least restrictive method that is still effective enough to contain or stop an assault or battery under South Dakota law.

Indeed, South Dakota's self-defense law is determinative whenever a person presents a threat of imminent harm to self or another within its jurisdiction. The State's self-defense law supersedes any administrative policy or code which interferes with an individual's right to use reasonable force under a reasonable person standard. There is absolutely no scientific evidence demonstrating that properly performed and engineered prone or supine holds are unsafe or unreasonable. We assert that any policy or regulation in this area must make clear that any restrictions on the use of restraint, including prone



and/or supine restraint, would not and could not apply when coming to the defense of self or others; when done in the best interests of the child as part of a IBP or IEP; when it is the least restrictive intervention and when it is necessary to maintain a safe environment.

The use of restraint, including prone and supine restraint, is not only permitted but is, in fact, is mandated under civil rights, state tort and South Dakota's broader self-defense law requiring staff to be able to reasonably, effectively and in the best interest of staff and student, respond to a threat to oneself or another. South Dakota State law does not require anyone to submit meekly to the unlawful infliction of violence regardless of what mental condition may be causing the threatening behavior or the age of the actor. This right to self-defense does not terminate when a teacher or student enters the schoolhouse gates. *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506 (1969)

A sworn officer responding to an emergency at a school would not be prevented from using a prone or supine hold in the course of containing and protecting someone, provided a reasonable and appropriate level of force was used. School staff and teachers often have far less physical assets, capabilities or tools than the average resource officer and have an even greater need to rely upon physical techniques and holds that provide sufficient mechanical advantage to safely manage the entire spectrum of students who may be much larger or physically capable than themselves. The vast majority of schools are not allowed to use chemical or mechanical restraints (i.e. handcuffs or soft restraints) to save themselves or others if their physical restraint program is insufficient. Neither the general public nor any self-respecting law enforcement officer in the United States would tolerate this level of intrusion into one's own personal safety or heartfelt sense of duty to protect the children under her care and supervision. School administrators, staff, teachers and students maintain the same rights as every other citizen in South Dakota and are allowed to use any manner of intervention that is least restrictive, effective and reasonable. It has been shown that it is both foreseeable and inevitable that staff will need to use prone or supine floor restraint to maintain safety.

### **Duty to Train**

The Supreme Court has held that agencies, facilities and schools have an obligation to train their employees for the tasks they will predictably face while at work. It is both likely and foreseeable that it will be impossible to maintain an intervention in a standing or seated position. Frankly, the student may dictate the circumstance and configuration. The facility has duty to train staff how to realistically handle these situations to protect themselves and others from harm. *Canton v. Harris*.

### **State Created Danger**

State-created danger is found when a person's substantive due process protections -- rights, privileges, or immunities secured by the Constitution and laws i.e. the right to defend and protect oneself or another from bodily harm --are abrogated by the State. "If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVit*. Among the historic liberties so protected is a right to be free from -- and to obtain judicial relief for -- unjustified intrusions on personal security. *Ingram v. Wright*. The State does not have the right to limit a person's right to defend themselves or another in any manner that is reasonable. Well-engineered prone or supine floor holds are entirely reasonable.

Rule 24.44 amounts to a State created danger. It includes an indiscriminate prohibition of all prone



(face down) and supine (face up) floor holds, regardless of how competently the hold is engineered. While the rule does permit seated holds, seated holds are inherently unstable, which is best illustrated by the “basket hold”. The basket hold is a prime example of an incompetently engineered seated hold with two weak connection points at the wrists. Because it lacks sufficient mechanical advantage, it has a fatal malfunction mode when it destabilizes from its seated configuration causing the teacher to lose control. Either, the teacher instinctively struggles to regain superior position by assuming a prone configuration with the student or the student puts them both in that position. With the child’s arms crisscrossed against his solar plexus (or diaphragm), the child’s weight alone is sufficient to create a positional asphyxiation. The basket hold was never intended to be a prone hold. By broadly painting all prone methods dangerous, this “prone” scenario is being exploited by those who really wish to ban the use of all restraint if they could.

According to Draft Rule 24.44, the basket hold in its seated configuration with its well-known history of causing fatalities will be permitted in SD schools while other more thoroughly and safely engineered prone and supine holds will not.

Positional asphyxia is caused by two things: 1) chest compression and 2) not paying attention. HWC’s prone method has been granted a Patent for its ability to prevent chest compression and the possibility of positional asphyxiation. You and your student are far safer in a well-engineered prone hold than you will ever be in a basket hold or any other seated hold.

The most inexplicable and bizarre provision in Rule 24.44 is its prohibition on supine floor holds. While supine holds lack the mechanical advantage of a prone hold and require two people to perform, there is nothing inherently unsafe about them, as long as you do not pile weight on the student’s chest. None of the designed supine holds of which we are familiar pile weight on the person’s chest.

With respect to mechanical advantage, every hold falls along a spectrum of advantage. Mechanical advantage becomes increasingly critical as the teacher is tasked with managing students with superior size, strength and athletic ability; beginning at about middle school age. The SD DOE does great harm to teachers and students by limiting access to proven methods that possess sufficient mechanical advantage and the safety protocols necessary to guarantee the safety of all concerned. The imposition of the rule is clearly intended to create a situation in SD classrooms that is so patently unsafe and frightening that teachers will be reluctant to use restraint at all. The proposed rule represents depravity in the service of ideology.

Rule 24.44 also precludes the use of restraint for the destruction of property in clear violation of existing SD law. If the long term goal is to prepare children to become self-sufficient, productive and law abiding citizens, we submit that expressly permitting the wanton destruction of property is completely contrary to that goal. If destroying property is unacceptable behavior by an adult it makes no sense to set a child up for failure in this way, which is exactly what this provision will accomplish. Attached are pictures of a classroom that a student destroyed when teachers were prohibited from preventing property destruction. This rule was rescinded within six months after enactment due to the chaos that ensued in schools.

This proposed rule is the most recent work of the radical “Restraint-free” movement in SD, which includes the publically-funded disability advocacy attorneys, advocates and others who are driving this movement in SD and elsewhere. The singular trait these advocates all share is, they possess strong visceral feelings about physical restraint absent any discernable expertise, whatsoever. Their shrill

proclamations are not supported by science or common sense. For the last decade they have been conducting a relentless witch-hunt against all prone methods by claiming they are universally unsafe. They are not. The fact that this proposed rule is being floated in SD simply proves, if you repeat a lie often enough and loudly enough it will eventually become true – or at least they hope.

### **Teachers Will Need Indemnification from Criminal Prosecution and Civil Complaints**

Teachers do not deserve to be held accountable for errant and illegal policies and rules promulgated by unelected administrative bureaucrats. No parent is going to tolerate uninterrupted acts of violence to be perpetrated on her child.<sup>1</sup> If SD-DOE enacts this rule, it should add a provision shielding schools and indemnifying school employees from both civil and criminal liability for failing to prevent or stop violent acts and destruction of property. Teachers can be prosecuted for neglect and abuse when they stand idly by as a child in her care is battered or injures himself. With a blanket ban on all floor holds, SD-DOE is essentially precluding teachers from using effective and reasonable methods of intervention, i.e., when students are on the ground fighting. Schools in SD will be targeted with a flood of lawsuits and investigations for abuse and neglect when teachers follow this law to the letter.

The only people who will not need indemnification for all the damage to persons and property this new rule will cause are the disability rights industry at large, its advocates and attorneys and, now, South Dakota's DOE - all operating from the safety and security of their offices.

Fortunately, when common sense fails there is always the law.

### **Rule 24.44 violates the following South Dakota Laws:**

#### **The Constitution of the State of South Dakota:**

**Article 6, Section 1: Inherent Rights.** All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying *and defending life and liberty*, of acquiring *and protecting property* and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

**Article 6, Section 18:** Equal privileges or immunities. No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

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<sup>1</sup> Teacher assistant criminally charged with child for failure to take action to protect students. <http://www.wftv.com/news/news/local/2-teacher-assistants-students-charged-after-classr/ncsCb/>. Multimillion dollar suit filed against school for failure to take action to protect students. <http://handlewithcare.com/tn-multimillion-dollar-suit-filed-against-school-for-failure-to-protect-bullying-assault-and-battery>. School bus driver may face charges for failure to protect. <http://handlewithcare.com/student-attacked-on-school-bus>. Michigan courts give teachers right to sue if school system fails to discipline students who are safety risks. <http://handlewithcare.com/mi-michigan-courts-give-teachers-right-to-sue-if-school-system-fails-to-discipline-students-who-are-safety-risks>. Lincoln County School District sued for millions for failing to protect students against a 6 year old.

If the state puts a man (or child) in danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit. *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). While legislators may be immune from suit, schools act in loco parentis of students and have an independent duty to protect.

**Article 6, Section 24:** Right to bear arms. The right of the citizens to bear arms in defense of themselves and the state shall not be denied.

**Conclusion:** South Dakota's Constitution gives educators the right to defend life, liberty, property, natural and inalienable rights by all means reasonable. An employee who works at a South Dakota school does not lose her right to defend self and others at school. This right is not subject to a "defend yourself, others or property as long as you do not go to the floor" standard. Further, the use of safely engineered floor holding methods are entirely reasonable and lawful.

**South Dakota Statutes:**

**22-5-1: Use of force in self-defense.**

Conduct forced or under threat of force. No person may be convicted of a crime based upon conduct in which that person engaged because of the use or threatened use of unlawful force upon himself, herself, or another person, which force or threatened use of force a reasonable person in that situation would have been lawfully unable to resist.

**22-5-9. Resistance to public offenses permitted.**

Any person may lawfully resist, by force or violence, the commission of any public offense as follows:

- (1) Any person, upon reasonable apprehension of threat of bodily injury, may make sufficient resistance to prevent an offense against his or her person or the person of any family or household member, or to prevent an illegal attempt by force to take or injure property in his or her lawful possession; and
- (2) Any person may make sufficient resistance in aid or defense of any other person, threatened with bodily injury, to prevent such offense.

**22-16-33. Justifiable homicide--Apprehending felon--Suppressing riot--Preserving peace.**

Homicide is justifiable if necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

**22-16-34. Justifiable homicide--Resisting attempted murder--Resisting felony on person or in dwelling house.**

Homicide is justifiable if committed by any person while resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is.

**22-16-35. Justifiable homicide--Defense of person--Defense of other persons in household.**

Homicide is justifiable if committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant if there is reasonable ground

to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished.

**22-18-4. Justifiable use of force to protect property--Use of deadly force--Duty to retreat.**

Any person is justified in the use of force or violence against another person when the person reasonably believes that such conduct is necessary to prevent or terminate the other person's trespass on or other criminal interference with real property or personal property lawfully in his or her possession or in the possession of another who is a member of his or her immediate family or household or of a person whose property he or she has a legal right to protect. However, the person is justified in the use of deadly force only as provided in §§ 22-16-34 and 22-16-35. A person does not have a duty to retreat if the person is in a place where he or she has a right to be.

**22-18-5. Reasonable force used by parent, guardian, or teacher in correcting child, pupil, or ward.**

To use or attempt to use or offer to use force upon or toward the person of another is not unlawful if committed by a parent or the authorized agent of any parent, or by any guardian, teacher, or other school official, in the exercise of a lawful authority to restrain or correct the child, pupil, or ward and if restraint or correction has been rendered necessary by the misconduct of the child, pupil, or ward, or by the child's refusal to obey the lawful command of such parent, or authorized agent, guardian, teacher, or other school official, and the force used is reasonable in manner and moderate in degree.

**Conclusion:** South Dakota Statutes give educators the right to defend themselves and others by all means reasonable. The reasonable standard is not akin to a prohibition on floor restraint. The use of safely engineered floor holding methods are entirely reasonable and lawful.

Teachers (and students) do not shed their rights at the schoolhouse gate. (*Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506 (1969)).

**Rule 24.44: violates the following Federal laws:**

**The United States Constitution:**

Specifically, 2nd, 5th, 9th and 14th Amendment rights to due process/equal protection. Defense of self and others is considered to be an inherent and fundamental right.

**The "Professional Judgment Standard" - when restraint is used as part of an IEP or IBP**

***Youngberg v. Romeo*, 457 U.S. 307 (1982)**

This Supreme Court applied the professional judgment standard in ruling that the legal responsibility for making treatment and safety decisions rests exclusively with our facility professionals who work directly with our patients and who are best able to 1) determine the clinical needs of the client and 2) balance those needs with the overall safety and security needs of the facility. IDEA and Rule 504 also support the individual's right to treatment and education.

In deciding *Youngberg*, SCOTUS established the "Professional Judgment Standard" and made it clear that it is only the state-licensed professionals working directly with a student who are 1) qualified and in a position to weigh the physical and emotional needs of the [student] and 2) in a position to balance the student's needs against the overall safety and security concerns and needs of the [school].

The safety protocols and restraining decisions which are specified in the student's Individualized Education or Behavior Plan (IEP/IBP) have the stamp of Constitutional approval. Education and treatment teams are operating within the scope of their training and license when they place their decisions regarding restraint, including what type of restraint method should be used with a particular child, into his or her IEP.

**St. Catherine's Care Center of Findlay v. Centers for Medicare & Medicaid Services, Docket No. C-01-721; Decision No Cr1190 (June 14, 2004)**

A Federal Administrative Court ruled that it is the responsibility of the entity that [is in charge of the student] to determine the crisis intervention [restraint] program in place at the [school]. The court also held that the crisis intervention and restraint program and policy in place must meet the "real needs" of the [school] and, further, "neither federal reimbursement practices nor state screening practices relieves the [school] of its responsibility to provide its [students] with necessary [education, safety] and services."

The duty and responsibility to provide appropriate treatment, welfare, safety and education decisions rests entirely with the school and treatment or education team. The opinion of legislators and bureaucrats, operating from a remote location and without benefit of contact with the student or a personal stake in a safe outcome, matters not according to the U.S Supreme Court.

**The Right to an Education:**

Children are smart. It does not take long for children and adolescents to realize where the behavioral lines are drawn and exactly how much latitude he has to disrupt a classroom or put others at risk before decisive action is taken. Students will quickly figure out that the adults and teachers are not able to perform a takedowns to an effective floor holding method and will act accordingly.

Children need to be protected from the physical and emotional consequences of their behavior in the short term and in the long term. If you agree that the ultimate goal of education is to prepare children and adolescents for the realities of adult life and to achieve personal and professional success, you are about to make that much harder for a large number of children in South Dakota. I know of no post high school graduation work situation or social environment that will ignore the kinds of dangerous and destructive behaviors teachers face every day. Children have a right to an education and some hope of a successful life as adults regardless of their condition or disability.

**In summary:**

SD-DOE's Draft Rule 24.44 violates and conflicts with Federal laws; South Dakota's Constitution, South Dakota's Statutes and South Dakota's case law and all common sense. SD-DOE is an administrative agency. It is not within the authority of an administrative agency to enact rules that run counter to or conflict with State law. The proposed rule needs to be re-drafted to comply with State and Federal law. As currently drafted it is unenforceable and would never withstand judicial challenge.


We will be forwarding this document to every school, teacher, legislator and media outlet in the South Dakota. We will be making it as easy as we can for SD's teachers to petition their State Attorney

General for his legal opinion regarding the legality of draft rule 24.44 and to request indemnification from the State.

For the record, our company can easily adapt to this new rule without any loss of income or financial distress to us. We advance these arguments on behalf of children and teachers because it is our duty as experts to do so.

Please feel free to contact me or Ms. Adler at 845-255-4031 or through the HWC website.

Sincerely,



Bruce Chapman, President  
Handle With Care  
[www.handlewithcare.com](http://www.handlewithcare.com)  
[www.brucechapman.com](http://www.brucechapman.com)

**Who we are:** Handle With Care Behavior Management System is a crisis intervention, verbal intervention and restraint training service provider with more than four decades of experience meeting the needs of virtually every type of human service environment; from nursery schools to penitentiaries. HWC is also a legal research center. We are nationally recognized as experts in this field with an unflinching commitment to creating therapeutic milieus that are safe and free from threats of physical harm and significant disruption. Hilary Adler is an attorney licensed to practice in New York. Bruce Chapman is President and founder of HWC. He is "qualified" to offer expert testimony in multiple jurisdictions throughout the U.S. on matters related to unarmed use-of-force, physical and mechanical restraint; in civil, administrative and criminal proceedings. He is also an inventor with 9 U.S. and International Patents with 3 additional Patents still Pending.

***Retaliation against HWC for the exercise of our first amendment rights will not be tolerated.***

## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Tuesday, March 01, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Cheryl Thlaer

Address: PO Box 430

City: Tyndall

State: SD

Zip: 57066

Email: [cheryl.thaler@k12.sd.us](mailto:cheryl.thaler@k12.sd.us)

Phone: 598-3134

Comment: I don't argue that some rules need to be in place regarding emergency safety interventions. I do have some concerns with how these are written and I list those below. 1) Restraint section What does appropriately trained as required by chapter 24:44:04 mean? Chapter 24:44:04 does not really provide additional information 2) Policies, Procedures and Administrative Provisions section "Each school shall establish policies and procedures regarding emergency safety interventions by July 1, 2016." This is a short time to have policies and procedures in place. 3) 24:44:04:06 – "All school employees who may need to administer emergency safety intervention shall be trained annually." 24:44:04:07 - "A core team of selected employees shall be designated to respond to dangerous behavior and to implement safety intervention of students. Who exactly does this mean? Must districts have people trained in each building (including colony schools)? If only certain people are trained, does one of those people have to be in attendance at all extra-curricular events, including all fine arts/athletic practices? Does the initial training have to take place prior to the start of the school year? What about training for employees who are hired during the school year? Thank you for considering my concerns.



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Tuesday, March 01, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Carey Mitzel

Address: 1214 Mulberry

City: Yankton

State: SD

Zip: 57078

Email: [cmitzel@ysd.k12.sd.us](mailto:cmitzel@ysd.k12.sd.us)

Phone: 605-665-2282

Comment: Passing further regulations on restraint and seclusion is not needed. I have been working with students for the past 10 years in a school that has classrooms for students that are on IEPs for emotional and behavioral issues. We train our staff in Nonviolent Crisis Prevention because it is a good practice and keeps our kids and teachers safe. We do not need regulations and additional paperwork involved in working with this population of students.





## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Tuesday, March 01, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Tom Oster

Address:

City: Volga

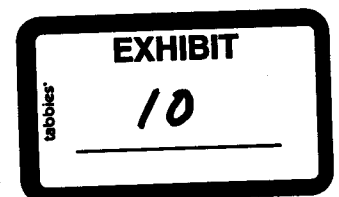
State: SD

Zip: 57071

Email: [thomas.oster@k12.sd.us](mailto:thomas.oster@k12.sd.us)

Phone:

Comment: I would respectfully request that the State BOE delay any action on this measure and take another year to bring more folks to the table to discuss the new rules and their consequences. I believe most everyone agrees that we need defined rules and guidelines, but we need to ensure that we get this right and that school districts have time to implement any required training. Thank you for the opportunity to comment.



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Tuesday, March 01, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Dean Christensen

Address: PO Box 770

City: Clear Lake

State: SD

Zip: 57226

Email: [dean.christensen@k12.sd.us](mailto:dean.christensen@k12.sd.us)

Phone: 605-874-2161

Comment: Bill 24:44 places an undue financial burden on school districts to comply with training for staff without providing any financial relief to meet those challenges. Mandating a core team of school employees be trained to handle this is unreasonable without the pay associated with taking on such a responsibility. Currently there is no funding to cover such a mandate. No person in their right mind would agree to take on the additional responsibility and probability of being sued without a corresponding pay raise. However well intentioned this bill may be, without funding to implement it places an unreasonable burden on the school district.



# Cornbelt Educational Cooperative

715 East 14th Street  
Sioux Falls, South Dakota 57104-5151  
Phone (605) 271-0218  
www.cornbeltcoop.k12.sd.us

MAR 02 2016

March 1, 2016

Dear State Board of Education Members:

We are submitting this public comment in regards to the Emergency Safety Intervention section proposed in the Administrative Rules (Article 24:44) being considered at the March 14, 2016 State Board of Education meeting. We represent the Cornbelt Educational Cooperative and its nine member school districts.

We are all committed to providing our children with a safe learning environment. However, there are many questions about the effects of these proposed Rules from "those in the field" that we feel need to be answered before we can decide whether to be in support or opposition of the proposed Rules.

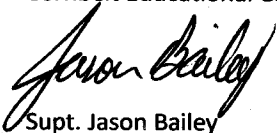
1. If a child's IEP team determines that a certain procedure is needed to provide that child with a Free and Appropriate Public Education (FAPE) but these Administrative Rules state that it is not allowed, how should the IEP team proceed to ensure they are in compliance with FAPE? Will we now be required to deny FAPE and violate federal law?
2. The proposed Rules list that a physical restraint to prevent property damage is prohibited (24:44:02:04). We understand this to mean that if a student is "out of control" school staff would not be allowed to intervene when a student is causing property damage (supplies, materials, furniture, building, etc.).
3. Does this Emergency Safety Intervention apply to all cases all the time, or only when applying Emergency Safety Intervention. For example, if a student is given In School Suspension (ISS) for excessive tardiness, is it considered seclusion? Or will it depend on the makeup of that ISS within each specific school? We all recognize that the makeup of ISS rooms, as well as the level of supervision, varies from district to district and even building to building (24:44:03:03).
4. We often teach children the strategy of self-removal. We want children to be able to recognize if they feel they need a "time-out" before they act out inappropriately. At this time they may be allowed to leave the environment for a certain amount of time as part of their behavior plan. With these proposed Rules, will this be considered seclusion? We are assuming it would not be seclusion since it is "voluntary".
5. The area of greatest concern deals with the staff training component of the proposed Rules (24:44:04:07). The proposed Rules state that all school employees who may need to administer Emergency Safety Intervention shall be trained annually. We have concerns that it will be a challenge to train all required parties within the required timeline. Another concern is the financial commitment that will accompany the training requirements as we understand this to be an unfunded mandate.
  - a. When will employees need to be trained by? July 1, 2016? The first day of school for the fall 2016 semester? Sometime during the 2016-2017 school year, and then annually thereafter?
  - b. Will contracted service employees also need to receive the training annually? For example, will bus drivers and kitchen/lunchroom staff who in a growing number of districts are not employees of the school but are employed by an outside contractor

- need to be trained? Will contracted personnel such as occupational and physical therapists be required to receive the annual training?
- c. Will substitute teachers be required to receive the training?
  - d. Can an employee be hired and start working for a school district prior to receiving the training? We all acknowledge how hard it is to recruit and retain substitute teachers, bus drivers, paraprofessionals, etc. These positions often have vacancies continually throughout the course of the school year which will present training challenges.
6. The proposed Rules discuss a core team (24:44:04:08). Will each school building be required to have a core team or only each school district? In our Cooperative we have several Hutterite colonies where there may only be two school employees at the attendance center; will they be their own core team as they are, in several cases, 20 plus minutes from the school in town? We also recognize the challenges this will pose for other rural schools, especially those located in remote west river South Dakota. Will it be a requirement that each of these unique situations is defined in each district's required individualized policy on Emergency Safety Intervention (24:44:04:01)?

Thank you for your time in considering our questions and request for clarification on the proposed Administrative Rules.



Dean Kueter, Director  
Cornbelt Educational Cooperative



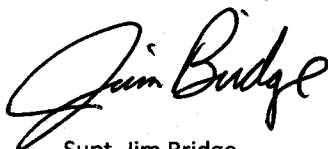
Supt. Jason Bailey  
Bridgewater-Emery



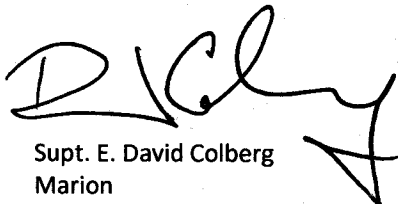
Supt. Larry Nebelsick  
Canistota



Supt. Don Hotchkiss  
Freeman



Supt. Jim Bridge  
Hanson



Supt. E. David Colberg  
Marion



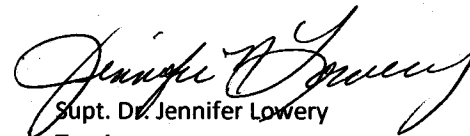
Supt. Loriny Johnson  
Montrose



Supt. Dr. Daniel Swartos  
McCook Central



Supt. Dr. Donovan DeBoer  
Parker



Supt. Dr. Jennifer Lowery  
Tea Area

"PROVIDING LEADERSHIP  
IN EDUCATIONAL SERVICES  
FOR ALL CHILDREN"



SERVING - Bridgewater-Emery, Canistota, Freeman, Hanson, Marion, McCook Central, Montrose, Parker, & Tea Area.

## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Thursday, March 03, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Lyn Heidenson

Address:

City: Brandon

State: SD

Zip: 57005

Email:

Phone:

Comment: I support the approval of ARSD 24:44 provided the definition of "supine restraint" remains as written in 24:44:01:02 (20).



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Monday, March 07, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Marie Ivers, Chair

Address:

City: Flandreau

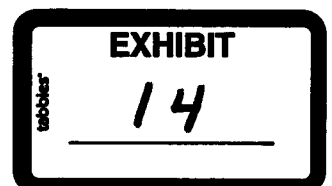
State: SD

Zip: 57028

Email: [Marie.Ivers@k12.sd.us](mailto:Marie.Ivers@k12.sd.us)

Phone: 605 864-1674

Comment: On behalf of the SD Advisory Panel for Children with Disabilities, We support the need for a collaborative restraint and seclusion policy, however, we do not feel that the proposed Emergency Safety Intervention policy realistically provides for adequate safety for both students and staff as it is currently written. Specifically, we are concerned with prohibiting prone and supine restraints as stated in 24:44:02:05. In certain situations alternate types of restraints may be safer, more effective and potentially decrease the chance of students and staff being harmed. We are also concerned that the deadline of July 1, 2016 does not provide adequate time for SD educational facilities to follow all procedures stated in 24:44:04:01, nor does it provide adequate resource-options for training or offer a financial solution or plan for/of implementation.



## Haddock, Ferne

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**From:** Admin and Rules <DOEAdminRules@state.sd.us>  
**Sent:** Monday, March 07, 2016 7:00 AM  
**To:** DOE Admin Rules  
**Subject:** Comment on : 24:44 (emergency safety intervention)

Name: Kari A. Oyen, Ed.S. NCSP

Address: 30396 466th Ave

City: Beresford

State: SD

Zip: 57004

Email: [kari.oyen@k12.sd.us](mailto:kari.oyen@k12.sd.us)

Phone: 605-360-8611

Comment: As a school psychologist in the State of South Dakota, I urge the Board of Education to give careful consideration to the adoption of these proposed administrative rules. Current practices do not define the limits of appropriate use of seclusion and restraint and this leaves our state very vulnerable to costly litigation and has, in the past, led to the injuries and even death of students due to the inappropriate use of seclusion and restraint practices. In the State of South Dakota, as of this date, prisoners have more protections in prison than students in our schools. This is inappropriate and we must do something to protect our students and staff. We are one of 3 states in our union that do not have protections for our students in school. We must make sure that we make school safe for all students, particularly those who are the most vulnerable. Students that are most likely to be secluded or restrained are often our most vulnerable populations that are not able to go home and tell their parents that their teachers are hurting them in school (particularly young children or children with disabilities). It is also well documented that many staff members are hurt by restraining kids due to inadequate training and lack of de-escalation skills. This leads to increased workers' compensation claims that are often costly to districts. Above all other aspects of the importance of these rules is the fundamental right to ensure that schools are a safe place for all students. By setting up parameters of practice and training school staff members on de-escalation techniques and appropriate use of seclusion and restraint practices, we equip our schools to be a safe learning environment.



MAR 07 2015

**Debbe Koenecke**  
PRESIDENT  
BOARD OF DIRECTORS

**Jerry Aberle**  
DIRECTOR  
Jerry.Aberle@k12.sd.us

**Tim Frewing**  
ASSISTANT DIRECTOR  
Tim.Frewing@k12.sd.us

**Brice Christensen**  
BUSINESS MANAGER  
Brice.Christensen@k12.sd.us

#### MEMBER DISTRICTS

- Arlington #38-1
- Britton-Hecla #45-4
- Castlewood #28-1
- Clark #12-2
- De Smet #38-2
- Deubrook #5-6
- Deuel #19-4
- Elkton #5-3
- Enemy Swim Day School
- Estelline #28-2
- Florence #14-1
- Grant-Deuel #25-3
- Hamlin #28-3
- Henry #14-2
- Iroquois #2-3
- Lake Preston #38-3
- Rosholt #54-4
- Sioux Valley #5-5
- Summit #54-6
- Waubay #18-3
- Waverly #14-5
- Webster Area #18-5
- Willow Lake #12-3
- Wilmot #54-7

## Northeast Educational Services Cooperative

P.O. Box 327 • Hayti, South Dakota 57241  
605-783-3607 • Fax 605-783-3259

March 3, 2016

South Dakota Department of Education  
Attn: Ferne Haddock  
800 Governors Drive  
Pierre, SD 57501

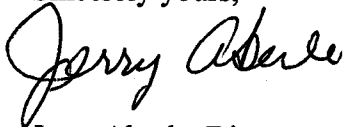
Dear State Board of Education:

The 24 school districts in the Northeast Educational Services Cooperative (NESC) have reviewed the proposed Emergency Safety Intervention rules.

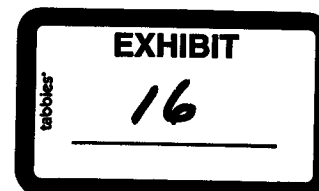
The schools within the Cooperative are committed to providing a safe learning environment for all students in their districts. However, with the proposed rules, there are several questions/concerns that should be addressed prior to the adoption of any rules. The questions/concerns are attached to this document.

The schools represented in this letter are asking that this issue be tabled for further study.

Sincerely yours,



Jerry Aberle, Director—on behalf of NESC member districts



*"Northeast Educational Services Cooperative (NESC) will work to provide specialized services to ensure that all children have the same opportunities to achieve success regardless of all challenges."*



## Questions and concerns regarding Article 24:44 Emergency Safety Intervention

Does **Article 24:44** apply to all school discipline, or just when there is a dangerous or emergency situation? For example, if a student is to report to in-school suspension (ISS) for tardies, insubordination, or vandalism, does this article apply? Would this type of in-school suspension be an example of seclusion as defined by **24:44:01:02 (17)**? Or would we now call these types of situations in-school detentions? If not, why wouldn't the definition of seclusion also exclude in-school suspension? Are the terms in-school detention and in-school suspension interchangeable?

### **24:44:01:02 Definitions:**

**Subsection 14—Letter E & Subsection 20.** A situation requiring “holding, touching, or physical contact with a student as part of the educational program” (ie: Individualized Education Plan or Behavior Plan) may be a possible scenario in a public school. However, the additional requirement of “supervision by a medical provider” more than likely is not feasible for many districts. Therefore, this will not be available as an exception to physical restraint for many districts. Also, does the Board intend to have distinction between a “medical provider” and “medical personnel”, as letter e ends with medical provider and number 20 ends with medical personnel?

### **24:44:02:04(5).**

Indicates physical restraint cannot be used to prevent property damage. According to the definition of physical restraint, these proposed rules will prevent any school employee from intervening when a student is destroying public property. Is that the intent of these rules?

### **24:44:03:03 Settings.**

Will this type of setting apply when ISS is used for non-emergency discipline?

If a district does choose to use seclusion during an emergency situation, there are very few districts that currently have a room that meets all the requirements as set forth in 24:44:03:03. Schools will have to prepare such a room as they do not know when or if they will ever need it. It will be an increased cost for districts.

### **24:44:03:04(1). Prohibited purposes.**

Clarification should be made as to whether this could restrict the use of ISS for non-emergency discipline.

### **24:44:04:01. Policies and procedures.**

It may be several months before the final implementation of these rules are in place. Therefore, requiring school districts to have safety intervention policies and procedures in place by July 1, 2016 may be unreasonable.

**24:44:04:07. Training.**

The proposed rules indicate "all school employees who may need to administer emergency safety intervention shall be trained annually." Since districts will not know which employees may need to implement a safety intervention, all employees in effect will have to be trained annually.

However, the proposed rules do mention that a core team of selected employees shall be designated to respond to dangerous behavior and to implement emergency safety intervention to students. Does this mean if a district has a core team trained, they don't have to train all school employees who may need to administer emergency safety intervention annually, just the core team?

Furthermore, the proposed rules state, "a core team of selected school employees shall be designated to respond to dangerous behavior and to implement emergency safety intervention of students." Is it the intention to have a core team of selected school employees respond to all dangerous behavior and to implement emergency safety intervention of students? This may be impossible. For example, on the school bus, in other school vehicles, at extra-curricular activities, or in a country school, a district may not have all if any core team members available to respond.

It appears a district may have to have all school employees who may need to administer emergency safety intervention trained annually as well as a designated core team. Is this correct?

Would the Board consider giving a district some time to get employees trained after they begin employment? There are emergency hires that happen within districts. Sometimes it is a teacher, a substitute teacher, paraprofessional, or bus driver, and at any given time these individuals may need to administer emergency safety intervention prior to being trained.

There will be additional costs associated with this training.

Finally, will SDCL 22-18-5 prevail if an untrained school employee uses physical restraint to restrain or correct a child's misconduct?